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NO. 626

In the Supreme Court of the United States

October Term, 1932

IN THE MATTER OF
GEORGE C. ARENZ, Bankrupt,

FIDELITY AND DEPOSIT COMPANY
OF MARYLAND, a corporation, Appellant,

vs.

GEORGE C. ARENZ, Appellee.

Brief for Appellee

Upon Appeal from the United States Circuit Court of Appeals for the Ninth Circuit

STATEMENT

It is claimed by appellant that George C. Arenz, the bankrupt, made a material false statement in writing for the purpose of obtaining from appellant the execution of

a surety bond and that by reason of this false statement the bankrupt should be denied his discharge in bankruptcy.

The history of this case discloses:

In May of 1929, the bankrupt entered into a contract with the State of Oregon for certain highway work. The Oregon Laws, Section 49-701 and Section 67-1101, Oregon Laws, 1930, provide that all contractors on public work shall give the usual penal bond with the additional obligation that they shall promptly make payments to all persons supplying them with labor or materials used in the prosecution of the work called for by such contract.

In compliance with the requirements of these sections, George C. Arenz, as principal, and the Fidelity and Deposit Company of Maryland, as surety, executed and delivered to the State of Oregon a bond in the penal sum of $71,306.25, conditioned that George C. Arenz, the contractor, would complete his contract and pay for all labor and material that entered into the prosecution of the work called for by the contract.

Shortly after completion of the contracted work, George C. Arenz, the bankrupt, was sued by one of the sub-contractors and judgment obtained in the sum of $10,000.00. The Fidelity and Deposit Company of Maryland paid this judgment and took an assignment thereof.

As assignee of the judgment, appellant filed its claim in the Arenz bankruptcy proceedings and made objection to discharge of the bankrupt, alleging three grounds or specifications therefor as follows:

(1) The bankrupt obtained money or property on credit upon a material false statement in writing.

(2) The bankrupt obtained an extension of credit from the objecting creditor upon a material false statement in writing; and

(3) The bankrupt committed an offense punishable by imprisonment as provided by the bankruptcy act.

Appellant's grounds for Objections 1 and 2 are found in Chapter III., Section 32, Title XI-U. S. Code (Amendment of 1926), the material part of which, in substance, provides a bankrupt shall be denied a discharge where he has:

> "Obtained *money* or *property* on credit or obtained an extension or renewal of credit by making or publishing or causing to be made or published, in any manner whatsoever, a materially false statement in writing respecting his financial condition."

Appellant's third objection: The bankrupt committed an offense punishable by imprisonment, is found in subdivision 1 of Section 32, Title XI., U. S. Code and subdivision 2 of Paragraph B of Section 52, Title XI., U. S. Code. This last Section is:

> "Made a false oath or account in, or in relation to, any proceeding in bankruptcy."

To these objections made and filed by the surety company, the bankrupt demurred on the ground that the

specifications therefor did not constitute sufficient cause to deny his discharge.

This demurrer was sustained by the District Court of Oregon, and on appeal to the Circuit Court of Appeals, Ninth Judicial District, was affirmed. Fidelity and Deposit Company vs. George C. Arenz, 61 Fed. (2nd) 607.

By this demurrer and for the purpose of the hearing, the bankrupt is obliged to admit the truth of the allegations of Fidelity and Deposit Company of Maryland that he obtained this bond by reason of a false written statement concerning his financial standing and which statement did induce the execution of the bond.

POINTS AND AUTHORITIES, FIRST OBJECTION

The obtaining of a surety or indemnity bond by a bankrupt by means of a material false statement is not the obtaining of property or money on credit within the meaning of the bankruptcy act, which bars a discharge.

Re Tanner, 192 Fed. 572.
Re Oliner, 262 Fed. 737 (CCA).
Re Ford, 14 Fed. (2nd) 848.
Fidelity & Deposit Co. vs. Arenz, 61 Fed. (2nd) 607.

POINTS AND AUTHORITIES, SECOND OBJECTION

"Extension"—"In commercial law an indulgence, giving time to pay a debt, or perform an obligation; the allowance on the part of a creditor to a debtor of further time

to pay a debt; the granting of further time in which to do something which has been set down for a particular day; a postponement by agreement of the parties of the time set for acting."

25 C. J., page 227.

"Renewal"—"In commercial and legal parlance the term means a continuance of an old obligation or the re-establishment of a particular contract for another period of time; revival or rehabilitation of an expiring subject. While renewal has been construed as equivalent to or synonymous with extension, it has also been distinguished from extension and has been held that a renewal as distinguished from mere extension is a separate and distinct contract, the substitution of a new right or obligation for another of the same nature."

54 C. J., page 380.

ARGUMENT ON FIRST AND SECOND OBJECTIONS

The one question presented is whether of not one who has secured the execution of a surety bond by reason of a false written financial statement has "obtained money or property on credit or obtained an extension or renewal of credit" within the meaning of the bankruptcy act regulating discharges.

As disclosed by the record of this case, the facts giving rise to the objections to discharge and which for the purpose of this consideration must be admitted as true, are:

The bankrupt obtained from the objecting creditor the execution of a bond in the sum of $71,306.25, running to the State of Oregon, with the objector as surety thereon, conditioned for the faithful performance of the bankrupt's contract, and the payment of labor and material entering into the prosecution of the work called for by said contract.

This bond was obtained by a written financial statement made by the bankrupt to the creditor, which statement was materially false in several particulars and that, the creditor relying upon the statement, executed the bond and became a surety thereon.

In support of its objections, appellant argues that a surety bond is both a loan of credit and a sale of credit and also property.

Under the bankrupt act a sale of credit or a loan of credit, if there was such a thing accomplished by the transactions between the bankrupt and the Surety Company, is immaterial for the reason the act does not embrace such transactions.

To hold such intangible things as a loan of credit or a sale of credit is within the act, is to enlarge the terms thereof beyond the plain intention of Congress, the law-making body of our system of government.

Appellant, to prevail, must convince the court that the bond is either money, property or an extension or renewal of credit. The bond must be one of these things.

This bond is not money and no such suggestion is made by appellant. The basis of appellant's objections is the

obtaining of the bond and not the payment of the money upon the bond. The distinction between money paid on a bond and the obtaining of the bond is sufficiently covered by the Circuit Court of Appeals in the Fidelity and Deposit Company vs. Arenz case to justify the submission of this contention without further argument. Suffice it to say that appellant itself is not sufficiently impressed with this idea to urge the same in its brief.

The next step is whether the obtaining of the bond was an extension or renewal of credit.

A brief consideration of the definition of the words "extension " and "renewal" as given in 25 C. J. 227 and 54 C. J. 380 is a sufficient answer to the suggestion that this bond might be an extension or a renewal of credit.

The facts disclosed by the entire proceedings (bankrupt's petition, schedule, objections) show only the procuring and execution of an original surety bond. Nowhere was there any enlargement of any time for the bankrupt to do or perform any particular act. In this particular case, there is nothing which will support the objection that an extension or renewal of credit was given.

Appellant and appellee are both of the same opinion that there is only one issue; is a surety bond property within the meaning of the bankruptcy act, and, if it is, was it obtained on credit.

It is evident that appellant takes and appreciates this position, for it attempts to liken itself to a merchant. It endeavors to apply to the services it sells, the same characteristics as ordinary merchandise.

Appellant desires the bond treated and considered for the purposes of this case as an article of merchandise.

On page nine of appellant's brief is found this:

> "If a bankrupt has obtained credit in the purchase of an automobile, or any other chattel, by virtue of a materially false financial statement, the decisions are uniform that, under the above quoted statute, discharge will be refused to him."

No quarrel is had with appellant's contention or authorities that a surety is a creditor in contemplation of the bankruptcy act, and that the relation of debtor and creditor exists between a surety and its principal.

These propositions of law, the supporting authorities, and appellant's definition of property, do not concern or touch the consideration of the point of law here involved.

Appellant is in the business of selling surety bonds upon graduated prices, called a premium, based on the penalties of the bond.

In accordance with its usual practice and business, appellant on application of the bankrupt sold the bankrupt a bond for which it charged and received its regular premium or price.

It readily appears that the financial statement had nothing to do with appellant's granting a credit to the bankrupt for the price of the bond, but had to do only with the surety company assuming certain obligations or liabilities. The bond itself, as distinguished from the obliga-

tion, was sold to the contractor without reliance upon the financial statement.

As no question is made as to premium payment or that a credit was given therefor it may be fairly urged that the purchase price of the bond was paid and that obligation satisfied.

Under appellant's authorities, that property is anything which has a debt paying or debt securing power, the financial statement objected to was not relied upon or used to pay the purchase price of the bond or to secure a credit therefor, but only to induce the surety to become a guarantor of the bankrupt's obligation to the State of Oregon..

Is this liability property? The surety company in this case assumed the relation of a guarantor. It entered into a collateral undertaking guaranteeing the obligation of the bankrupt, agreeing to pay the resulting damages if the principal failed to perform. (28 C. J. 887).

The Company assumed a future contingent liability. There was nothing tangible until default was made by the principal and payment by the guarantor.

Without doubt in using the word "property" Congress had in mind such property or rights as are capable of manual delivery or of assignment. In this case there was nothing capable of transfer or assignment, merely an inchoate, contingent chose in action.

This contract was made in the State of Oregon and would be governed by the laws of this State. In the case

of Hillman vs. Shannahan, 4 Ore. 164, at Page 170, the Oregon Supreme Court holds that a right of action dependent upon a breach of covenant cannot be assigned prior to the happening of the breach of covenant. That until the happening of a breach of a condition the interest of the owner of the chose in action is a mere possibility or contingency not assignable at law.

A mere inchoate contingent chose in action is not money or property within the purview of the bankruptcy statute.

The only Federal case that Counsel for bankrupt is able to find that is anywhere contrary to the holding of the cases cited is Royal Indemnity Co. vs. Cooper, 26 Fed. (2nd) 585.

In this case the surety company indemnified the State of North Carolina for deposits made in the Commercial National Bank of Wilmington, N. C. The bankrupt was one of the principal officers of the bank. He obtained on behalf of the bank the bond in question by giving collateral and making a statement of his financial worth. The case cites the case of Re Ford, 14 Fed. (2nd), and concludes with this:

> "We cannot agree that the reasoning in the two cases here relied upon by appellee is controlling here. The bankrupt had given his personal bond to secure the deposit of state funds in the bank, and had deposited collateral for the same purpose, and in securing the bond from the appellant, if he *did not*

obtain money or property on credit, he did at least obtain an extension of credit for the bank."

We cannot follow the reasoning of the Circuit Court of Appeals of the Fourth District. If the bankrupt did not obtain money or property on credit, we do not see how he, on the other hand, obtained an extension of credit. Our view is that an extension of credit is an indulgence to one's debtor. The bankrupt did not in this North Carolina case receive an extension of credit from the indemnity company. If anyone gave an extension of credit it would be the State of North Carolina.

This decision strikes the appellee as thongh the Court was dissatisfied with the law as enacted and, without proper consideration, decided that it would not be limited by the plain wording of a statute. It possibly allowed its idea of right and wrong to outweigh and overcome the law as written.

The mere fact that the obligation assumed is possibly valuable does not make it property within the terms of the bankrupt act.

In Gleason vs. Shaw, 236 U. S. 538, and also in Re Thaw, 180 Federal 419, affirmed 180 Fed. 417 (CCA 3rd) it is held that the services and fees of an attorney are not property within the provisions of the bankrupt law, giving grounds to refuse the discharge for obtaining property under false representations.

It is hoped that the Court will agree with us that the services and fees of an attorney are something of value. The point made, by reference to this case is, that the mere

fact that something of value is given or flows to one party or another does not make it property within the meaning of this section of the bankrupt act.

The mere fact that the objection is based upon the grounds of false statements or misrepresentations will not prevent the operation of a discharge unless the bankrupt has obtained that which is property on credit. If he has paid for the property, the fact that false statements have been made is not material. In every consideration whether the right received is property or not, the question arises whether or not the party entitled thereto has a right of disposition over the same.

Under the law of the State where the contract was made, the surety company had nothing which it could dispose of, until default and payment. Therefore the liability assumed was not property.

What was undertaken by the appellant surety company was a contingent obligation to pay, which would not have been assumed, financial statement or no financial statement, if it had contemplated a loss was to be suffered by the contractor on his work.

ARGUMENT ON THIRD OBJECTION

Objection No. 3—Committed an offense punishable by imprisonment:

In consideration of this objection the petition and schedules filed are treated the same as pleadings.

An examination of the bankrupt's petition and schedules show: Schedule "A," list of secured creditors, Oregon

Construction Co., $12,500.00, secured by the pledge of 124 shares of the Oregon Construction Co.

Through inadvertance this stock which was shown pledged to secure a debt and which had a par value of $100, with an actual value to about $20.00, was not listed in the Schedule "B" of assets. This is the basis of the surety company's third objection.

The objecting creditor did not appear or examine the bankrupt. This mistake more than likely would have appeared in this examination, and had it been raised the Schedule could have readily been amended.

Bankrupt submits that the third objection is not sufficient for the reason:

1. He would not be subject to prosecution for perjury.

2. It affirmatively appears that there was no intent to conceal.

3. The property is without value to the estate.

4. The bankrupt had no property or equity in these shares.

False oath means such as would subject the affiant to a persecution for perjury.

Re Gilpin, 160 F. 171.

Intent is a material element.

Re Hale, 206 F. 858.

If appeared and examined, all facts in connection with transaction would have been disclosed.

Re Servel, 30 F. (2) 102.

The making by a voluntary bankrupt of oath to his schedules in which it was stated that he had no property when in fact he had a small amount of money ($55) with which he paid the costs and a small amount of household furniture which he could claim as exempt, held not sufficient to constitute the offense of knowingly and fraudulently making a false oath.

Humphries vs. Nalley (CCA-5); 296 F. 607.

Where the item omitted was of a very doubtful value or where the bankrupt's title to it was doubtful in law, there has not been a false oath by failure to include it in the schedule.

Re Shoemaker, Fed. Case No. 12799.

Generally: The bankrupt act should be construed liberally in favor of the bankrupt and strictly against the objector.

Re Cooper, 26 Fed. (2nd) 585.

Re Lee, 51 Fed. (2nd) 394-395.

Bankrupt submits that his demurrer to the amended objections for the reason that the specifications of the objections are not under the bankrupt law sufficient to justify the court in refusing or denying the bankrupt's discharge is properly taken.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES.

No. 1.—October Term, 1933.

Fidelity and Deposit Company of Maryland, Petitioner,
vs.
George C. Arenz.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

[November 6, 1933.]

Mr. Justice Butler delivered the opinion of the Court.

In 1929 respondent, for the purpose of procuring a contract with Oregon for highway construction and in compliance with applicable statutes (§§ 49-701 and 67-1101, Oregon Code, 1930), gave to the State a bond on which petitioner was surety conditioned that he would pay for labor and material entering into the work. He failed, and one who had furnished him labor and material sued on the bond and obtained a judgment for $10,000 against principal and surety jointly. Petitioner paid and took an assignment of the judgment. In 1931 respondent, having been adjudged bankrupt, applied for discharge from his debts including that due petitioner on account of such payment. Petitioner filed objections showing that respondent induced it to become surety by means of materially false written statements in respect of his financial condition. Respondent demurred, the district court sustained the demurrer and entered a decree of discharge. The Circuit Court of Appeals affirmed (61 F. (2d) 607) following decisions of district courts in that circuit (*In re Tanner*, 192 Fed. 572, and *In re Ford*, 14 F. (2d) 848).

The Bankruptcy Act, § 14 as amended, 11 U. S. C., § 32 (b) (3), requires denial of discharge if the bankrupt "obtained money or property on credit . . . by making . . . a materially false statement in writing respecting his financial condition". Petitioner's obligation was given in behalf of respondent and inured to his benefit. It was a means by which he procured the contract and was security for the payment of his indebtedness

incurred for labor or material required to do the work. But respondent insists that the bond is not property and that his fraud in obtaining it is not within the condemnation of clause (3). "Property" is a word of very broad meaning and when used without qualification, expressly made or plainly implied, it reasonably may be construed to include obligations, rights and other intangibles as well as physical things. *Delassus* v. *United States*, 9 Pet. 117, 133. *Pritchard* v. *Norton*, 106 U. S. 124, 132. *Bryan* v. *Kennett*, 113 U. S. 179, 192. *Pirie* v. *Chicago Title and Trust Company*, 182 U. S. 438, 443. *Farmers Loan Co.* v. *Minnesota*, 280 U. S. 204. *In re Louisville Nat. Banking Co.*, 158 Fed. 403. *Samet* v. *Farmers' & Merchants' Nat. Bank*, 247 Fed. 669. *Royal Indemnity Co.* v. *Cooper*, 26 F. (2d) 585, 587. *Matter of Dunfee*, 219 N. Y. 188. *Dunlap* v. *Tol., A. A. & G. T. Ry.*, 50 Mich. 470, 474. *Cincinnati* v. *Hafer*, 49 Ohio 60, 65. *Dillingham* v. *Insurance Co.*, 120 Tenn. 302, 315. For the meaning rightly here to be given the word, regard is to be had to the statute and connection in which it is found *Nashville Ry.* v. *Tennessee*, 262 U. S. 318, 323. *Wells, Fargo & Co.* v. *Mayor, etc., of Jersey City*, 207 Fed. 871, 876. The Act, while making discharge of bankrupts the general rule, conditions the grant upon adherence by every applicant to the standards of honesty and fair dealing in business transactions that are required or reflected in § 32 (b) (1), (2), (3), (4), (6), (7). The fraud perpetrated by respondent is of the kind condemned. Giving effect to the rule that legislative intent controls, it is plain that "property" includes petitioner's obligation according to the terms of the bond to pay respondent's debts. *Matter of Dunfee, supra. Gaddy* v. *Witt* (Tex. Civ. App.) 142 S. W. 926. *Royal Indemnity Co.* v. *Cooper, supra.* In *Gleason* v. *Thaw*, 236 U. S. 558, this court held that the professional services of an attorney were not within § 17 (2) which excepts from the general discharge liabilities for property obtained by false pretenses. That was a close case. See 185 Fed. 345, 196 Fed. 359. The principle of construction there applied may not reasonably be extended to this one.

It remains to be considered whether the respondent obtained petitioner's obligation "on credit". Principal and surety must be held to have had in contemplation all liabilities that naturally might arise from such a contract. *Matter of Dunfee, supra.* Re-

spondent was bound by agreement, implied by law if not expressly made, that he would make good to petitioner whatever the latter as such surety might be required to pay. Petitioner gave its obligation, not for the premium alone, but also in consideration of respondent's promise to reimburse it. Having regard to the results that at the beginning the parties were reasonably bound to anticipate, it is clear that respondent obtained, and petitioner gave, the bond and obligation on credit. See *Swarts* v. *Siegel*, 117 Fed. 13, 17. *Kobusch* v. *Hand*, 156 Fed. 660, 662. While clause (3) seems aimed particularly at false pretenses made by borrowers and purchasers to obtain money or goods on credit (*Firestone* v. *Harvey*, 174 Fed. 574, 577), it is not limited to such transactions. Respondent's application for discharge should have been denied.

Reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.